Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK ALLEN McKINNEY,
Petitioner,

v.

KENNY ROBINSON, WARDEN,
MOUND CORRECTIONAL FACILITY
MICHIGAN DEPARTMENT OF CORRECTION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

IS PETITIONER BEING HELD UNLAWFULLY HAVING BEEN DEPRIVED OF HIS LIBERTY, WITHOUT DUE PROCESS OF LAW AND SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF AMENDMENTS V, VIII, AND XIV OF THE CONSTITUTION OF THE UNITED STATES WHERE:

1. THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION AND DELIBERATION ADDUCED AT TRIAL TO SUPPORT HIS FIRST DEGREE MURDER CONVICTION?

2. DEFENSE COUNSEL FAILED TO PROVIDE EFFECTIVE REPRESENTATION BY UNREASONABLY PURSUING A STRATEGY OF PERSUADING THE JURY THAT PETITIONER WAS GUILTY ONLY OF VOLUNTARY MANSLAUGHTER WHERE REASONABLY COMPETENT COUNSEL WOULD HAVE ARGUED ALSO THAT, AT MOST, PETITIONER WAS GUILTY OF SECOND DEGREE MURDER?

3. THE TRIAL JUDGE ABUSED HIS DISCRETION BY ADMITTING INTO EVIDENCE OVER OBJECTION UNFAIRLY PREJUDICIAL PHOTOGRAPHS OF THE DECEASED'S BODY?

4. MICHIGAN'S MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE FOR FIRST DEGREE MURDER IS UNCONSTITUTIONAL AS APPLIED TO PETITIONER BECAUSE IN LIGHT OF HIS AGE AND LACK OF CRIMINAL HISTORY, THE ABSENCE OF JUDICIAL

DISCRETION IN SUCH SENTENCE REQUIREMENT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

PARTIES TO THE PROCEEDINGS

Petitioner

Frederick Allen McKinney, an individual with no corporate affiliations.

Respondent

Kenny Robinson, Warden, Mound Correctional Facility, Michigan Department of Corrections

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The Petitioner, Frederick Allen McKinney, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on March 7, 2000.

OPINIONS BELOW AND JURISDICTION

On March 7, 2000, the Court of Appeals entered its Order denying petitioner's motion for a certificate of appealability pursuant to Fed. R. App. P. 22(b)(1) and affirming the orders of the United States District Court for the Eastern District of Michigan dismissing his petition for a writ of habeas corpus and request for a certificate of appealability entered on October 14, 1999 and December 3, 1999, respectively. The Court of Appeals' Order and District Court's Orders and Judgment are reproduced herein as Appendices A, through C. Jurisdiction of this Court is invoked pursuant to 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment XIV,
Section 1: "No State shall . . . deprive any person of life, liberty, or property without due process of law . . ."

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MCL 750.227(2);
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MCL 750.227b(1);
MSA 28.524(2)(1): "A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony . . ."

MCL 750.316(1)(a);
MSA 28.548(1)(a): "A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life; (a) murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing . . ."

MCL 750.317;
MSA 28.549: "All other kinds of murder shall be murder of the second degree, and shall be punished

by imprisonment in the State prison for life, or any term of years, in the discretion of the court trying the same."

STATEMENT OF THE CASE

Petitioner Frederick Allen McKinney (hereinafter "petitioner") was charged with first degree murder contrary to the Michigan Penal Code (MCL 750.316; MSA 28.548), use of a firearm during the commission of another felony (MCL 750.227b; MSA 28.424)(2)), and carrying a concealed pistol (MCL 750.227; MSA 28.424). On May 19, 1994, a Saginaw County Circuit Court jury convicted him of all charges and on June 16, 1994, he was sentenced to life imprisonment without parole for the murder consecutive to two years in prison for the felony firearm and two-to-five years concurrent for the concealed weapon.

The charges arose out of the shooting death, on the night of November 26, 1993, of Bruce Longuemire (hereinafter "deceased"). At trial, petitioner admitted shooting and killing deceased at the front door of the home of a mutual acquaintance. The prosecution argued that petitioner acted with premeditation and without reasonable provocation when he shot deceased. The defense argued that petitioner was guilty only of manslaughter because he acted in the heat of passion.

Testimony at trial established that petitioner, who was then seventeen years old, had dated Arnetra Stacey (hereinafter "Arnetra"), also seventeen, for approximately one and one-half years. On the night of the shooting petitioner worked at Little Caesar's Pizza until 8:00 P.M. but,

earlier in the day, had arranged to meet Arnetra at her house at 9:00 P.M. However, in making said arrangements, Arnetra told petitioner a lie, *i.e.* that she and her friend Yvette Haynes (hereinafter "Yvette") would be at a Wendy's Restaurant and a K-Mart before their meeting when, in fact, she and Yvette planned to meet with Arnetra's old boyfriend, deceased, and his friend, Stewart Sumpter (hereinafter "Stewart"), at Yvette's house. After work, petitioner went home; showered; changed his clothes; and drove to Arnetra's house, arriving at approximately 8:30 P.M. Not finding her at home and after waiting several minutes, he drove by the K-Mart and Wendy's in search of Arnetra's car. By 9:00 P.M. he returned to Arnetra's home and then drove past the home of a friend of Arnetra's, Monica Brandon, and proceeded to Yvette's house where he saw Arnetra's car at approximately 9:20 P.M.

Petitioner parked his car; approached the house; and knocked on the outer screen-porch door. Receiving no response, he began pounding loudly. He then went to the side of the house, looked in a window and rapped on the glass. A neighbor, seeing petitioner standing in the rain and hearing music coming from the Haynes house, telephoned Yvette to inform her that petitioner was outside. Petitioner stepped inside the screen porch; approached the main door; and, looking through the front door window, saw Yvette and Stewart inside. He could not see Arnetra because she was in a bedroom with deceased. Stewart testified that deceased told him the two had engaged in sexual acts. Arnetra, however, testified that they had been playing with a Baby Patch doll. At the main door, petitioner requested that Yvette let him in and Yvette testified that petitioner sounded angry and was banging on the door like he was going to tear it down. She testified further that on the previous night she had heard petitioner tell Arnetra that he would kill any man he found

talking to her. She did not let him in because she was afraid he would get into a fight with deceased inside her mother's house. Stewart testified that the banging went on for ten-to-fifteen minutes.

Arnetra exited the back door of the house and met petitioner at the side of the house, telling him that neither of the "dudes" inside were "for her". Petitioner asked what she meant by "dudes" because he had seen only one man with Yvette. Arnetra testified that petitioner appeared very angry and that she tried to calm him down. They proceeded toward the front of the house.

Several minutes after Arnetra exited the house, Stewart and deceased went outside to determine what was occurring. They were standing on the front porch as petitioner asked which of the two had been talking to his girlfriend. Deceased responded "what's up?". Both petitioner and Arnetra testified that in their neighborhood "what's up?" when spoken between strangers, was a challenge to fight. Stewart, who was visiting from South Carolina, testified that while the phrase could be a challenge to fight, deceased ended it with "man" which signified respect between strangers and which indicated the phrase was merely posed as a question and not as a challenge. Petitioner stated that, although deceased's tone of voice was not angry or threatening, he interpreted it to be a challenge under the circumstances.

Within "seconds" of the statement, petitioner pulled a gun out of his coat and shot at deceased several times. Petitioner testified that "because I was so mad, because he approached me like that and I was already swelled up from anger from what my girl had did, and I just -- I just shot him." He said he was angry and upset and "wasn't thinking

straight" when he aimed the gun, but did not intend to kill deceased intending instead to "scare him and hurt him."

Petitioner and Arnetra testified that he had purchased the gun several weeks before the shooting for protection as a result of someone breaking into his car. He bought the gun for protection because "guns speak louder than words".

A police detective testified that he removed bullets from the scene and that one bullet had entered the floor immediately inside the front door at a downward angle. He opined that this bullet had been fired from either the front door entrance or inside the house.

A pathologist, who performed the autopsy, testified that two bullets entered deceased's body; one in the lower back, and one in the right side of the neck. The latter did no major damage but death was caused by the former. The path of the back wound was consistent with the shot being fired either while deceased lay on the ground or while he stood at the top of a flight of stairs and the shooter stood at the bottom.

Over defense counsel's objection, several photographs of deceased's body were admitted into evidence. Although defense counsel offered to stipulate to the cause of death and the number of gunshot wounds, the prosecutor asserted the photographs were needed to help prove that petitioner intended to kill deceased as opposed to merely inflict great bodily harm. The prosecutor acknowledged that the photographs were "inflammatory" and of an "upsetting" and "disturbing" nature. The trial judge, however, stated that the photographs were not overly shocking and held that their probative value outweighed the risk of undue prejudice to petitioner.

In his closing argument, the prosecutor asserted that petitioner shot deceased in response to, and based on no other provocation than, deceased's inquiry "what"s up?" The prosecutor did not argue that petitioner premeditated and deliberated an intent to kill before pulling his gun. Instead, the prosecutor argued that premeditation and deliberation occurred after petitioner started shooting and that, during the span of a few seconds, "each step that Frederick McKinney took up the steps . . .(he) had a chance to think about each shot that he fired . . . He had a chance to consider what the effect was going to be of each one of the bullets that came out of the barrel of that gun. He had a chance to deliberate."

In his closing argument, defense counsel briefly outlined the general categories of homicide. While admitting that the evidence might show an intent to kill, he argued the jury should convict petitioner only of voluntary manslaughter in that the combination of his girlfriend's lies and denial of access to the house led to petitioner's increasing levels of anger. Counsel asserted that, in this heightened state of anger, petitioner was confronted by deceased's statement "What's up?". This challenge, accompanied by a suspicion that deceased had been with his girlfriend, amounted to adequate provocation and caused petitioner to impulsively pull the gun and fire in the heat of passion.

The jury began deliberations at 10:55 A.M. and returned a verdict approximately five hours later. At sentencing, the presiding judge stated that in light of the mandatory sentence of life without parole the eighteen year-old petitioner's "life, or all practical purposes, (was) to be over."

Petitioner appealed by right raising four claims of error. In the unpublished, *per curium* opinion dated May 2,

1997, the Michigan Court of Appeals affirmed petitioner's convictions and sentences. The Michigan Supreme Court denied his application for leave to appeal in an order dated January 30, 1998. His petition for a federal writ of habeas corpus and requests for certificates of appealability were denied by The United States District Court for the Eastern District of Michigan on October 14, and December 3, 1999, and by The United States Court of Appeals for the Sixth Circuit on March 7, 2000.

ARGUMENT FOR GRANTING THE WRIT

PETITIONER IS BEING HELD UNLAWFULLY HAVING BEEN DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW AND SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF AMENDMENTS V, VIII, AND XIV TO THE CONSTITUTION OF THE UNITED STATES WHERE:

1. Petitioner's First Degree Murder Conviction Must Be Reduced To Second Degree Murder Because There Was Insufficient Evidence Of Premeditation And Deliberation Adduced At Trial To Support The First Degree Murder Verdict.

The crucial issue at trial was petitioner's state of mind at the time of the shooting and whether that made him guilty of first degree murder or some lesser offense.

In attempting to prove the required element of a premeditated and deliberated intent to kill in order to establish first degree murder, the prosecutor focused, both at the evidentiary stage of the trial and during closing argument, on what went through petitioner's mind after he began shooting at deceased.

Based on the prosecutor's theory of the case, the evidence was not sufficient to permit a reasonable jury to find that petitioner shot deceased with a premeditated and deliberated intent to kill.

The prosecution has the burden of proving every element of the charged offense beyond a reasonable doubt. A defendant convicted of a charge not proven beyond a reasonable doubt is denied due process under the Fifth and Fourteenth Amendments to the United States Constitution. *In re Winship*, 395 U.S. 358; 90 S.Ct. 1068, 25 L.Ed2d 368 (1970); *People vs. Goss,* 446 Mich. 587; 521 N.W.2d 312 (1994)). In determining the sufficiency of the evidence in a criminal jury trial the reviewing court examines the record in the light most favorable to the prosecution to determine whether a rational jury could have found each required element of the charged crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781; 616 L.Ed.2d 908 (1929). *People v. Hampton*, 407 Mich. 254; 285 N.W.2d 284; *cert denied sub nom Michigan v. Hampton,* 449 U.S. 885; 101 S.Ct. 239; 66 L.Ed2d 110 (1979).

The Michigan legislature created statutory distinctions between first and second degree murder in the nineteenth century. First degree murder is distinguished from second degree murder by a requirement that the defendant premeditated and deliberated a specific intent to kill. MCL 750.316; MSA 28.548; MCL 750.317; MSA 28.549. While

the statutory distinction is clear, the task of elucidating the substantive criteria for premeditation and deliberation has proven more difficult. Nonetheless, properly distinguishing between first and second degree murder remains essential to give meaning to the statutory distinction.

> "The Penal Code defines first degree murder as 'willful, deliberate and premeditated killing', while second-degree murder is defined residually as '(a)ll other kinds of murder'. This 'legislative classification of murder into two degrees would be meaningless if deliberation and premeditation were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill.'"

People v. Hoffmeister, 394 Mich.155, 158, 220 N.W.2d 305 (1975) (quoting *People v. Anderson*, 70 Cal.2d 15, 26; 447 P.2d 942, 948, 73 Cal.Rptr. 550, 556 (1968); *People v. Morrin*, 31 Mich. App. 301, 329; 187 N.W.2d 434 (1971)).

To establish first degree murder, the prosecution must prove that the defendant intentionally killed the victim with premeditation and deliberation. *Hoffmeister, supra* at 158. Premeditation is characterized as a thought process undisturbed by "hot blood". *People v. Vail*, 391 Mich. 460, 469, 473; 227 N.W.2d 535 (1975) (finding it "a perversion of terms to apply the term deliberate to any act that is done on a sudden impulse") quoting *Nye v. People*, 35 Mich. 16 (1876).

Because premeditation is difficult to prove conclusively, it can be inferred from the totality of circumstances surrounding the killing, *People v. Tilley*, 405 Mich. 38, 44; 273 N.W.2d 41 (1979), so long as the

inference has an adequate basis in the record. *Hoffmeister, supra*, at 159. While the amount of time required to premeditate is "'incapable of exact determination'" *Vail, supra*, at 470 (quoting *People v. Morrin*, 31 Mich. App. 301; 187 N.W.2d 434 (1971)), until *Tilley*, Michigan Courts consistently found that the time period for premeditation and deliberation must precede the commencement of the act which causes death. *Vail, supra* (requiring sufficient time for the defendant to "take a second look" before acting); *People v. Morris*, 202 Mich. App. 620, 509 N.W.2d 865 (1993) (requiring that premeditation take place beforehand).

In the present case, taken in a light most favorable to the prosecution, the evidence presented at trial was not sufficient to permit a reasonable jury to find that petitioner premeditated and deliberated, or took a "second look," before firing his gun at deceased. Testimony established that petitioner did not know of deceased's presence until moments before they confronted each other at the front door and thus could not have premeditated an intent to kill someone that he did not know was inside the house. The prosecutor argued that petitioner shot at deceased for no other reason than deceased's statement "what's up?" which occurred seconds before the shooting. Testimony showed that after deceased asked him "what's up?" petitioner immediately pulled his gun and started shooting.

Yvette's testimony that the night before the shooting petitioner threatened to kill anyone he found talking to his girlfriend could not have been used by the jury as circumstantial evidence of premeditation. If anything, it was speculative of an intent to kill in the event petitioner was ever confronted with that situation. The *Hoffmeister* court held that to equate an intent to kill with the act of premeditation is not permissible.

Similarly, the fact that petitioner carried a gun up to the house preceding the shooting does not support a finding of premeditation. The record shows that petitioner bought the weapon for protection associated with a recent break-in of his car. There was no evidence that he carried it because he intended to use it on someone inside the house. To the contrary, the record indicates that he only found out that there were men in the house after he reached the front door. Had petitioner returned to the car to retrieve the gun after becoming aware of the presence of men in the house, the jury might have been provided with a basis to infer premeditation. But that did not happen.

The prosecutor, by arguing that petitioner's conduct after the first shot established premeditation, implicitly conceded that petitioner's conduct prior to firing the first shot would not support a finding that he was acting with a premeditated and deliberate intent to kill. Indeed the prosecutor used the evidence regarding the alleged prior threatening statement and petitioner's carrying a gun up to the house to argue only that petitioner intended to kill deceased. The prosecutor did not argue that it supported an inference of a premeditated and deliberated intent to kill.

The prosecutor did not argue that there was sufficient time before petitioner pulled his gun to premeditate and deliberate. The record establishes that petitioner was unaware of deceased's presence in the house until Arnetra told him moments before the shooting. The prosecutor argued that petitioner did not "decide" to shoot deceased until he reacted to the statement "what's up?" and that petitioner had "a chance to deliberate" between "each shot that he fired."

Accordingly, the evidence on the record was not sufficient to permit a reasonable jury to find that petitioner

premeditated and deliberated an intent to kill. Therefore, his first degree murder conviction must be reduced to second degree murder.

2. Petitioner's First Degree Murder Conviction Must Be Reduced To Second Degree Murder Because Defense Counsel Failed To Provide Effective Representation By Unreasonably Pursuing A Strategy Of Persuading The Jury That Petitioner Was Guilty Only Of Voluntary Manslaughter Where Reasonably Competent Counsel Would Have Argued Also That, At Most, Petitioner Was Guilty Of Second Degree Murder.

Strickland v. Washington guarantees defendants effective representation as a consitutional right under the Sixth and Fourteenth Amendments to the United States Constitution. 466 U.S. 668; 104 S.Ct. 2052;80 L.Ed.2d 674 (1984). In evaluating claims of ineffective assistance of counsel, Michigan courts follow *Strickland* (so held in *People v. Pickens*, 446 Mich. 298, 521 N.W.2d 787 (1994)) which requires a showing that defense counsel fabled to perform as well as a reasonably competent attorney, and that the defendant was prejudiced by the defective representation *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The defendant has the burden of showing both deficient performance and actual prejudice.

In assessing the reasonableness of the assistance provided, the defense must overcome a presumption that the

challenged action should be considered sound trial strategy. *Strickland Id.* at 689; *Pickens Id.* at 326. To defeat such a presumption, the defendant must show that counsel's decision deprived him of a substantial defense that had a reasonable probability of affecting the jury's verdict. "'Reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Strickland, Id.* at 694; *Pickens* at 312.

Under Michigan law, voluntary manslaughter requires a showing that the defendant killed the victim (i) while in the heat of passion, (ii) produced by adequate provocation, and (iii) before the defendant had time to regain control over his actions. *People v. Younger*, 380 Mich. 678, 681-682; 158 N.W.2d 493, (1968); *People v. Pouncey*, 437 Mich. 382, 388; 471 N.W.2d 346 (1981). While the appellate courts have refused to establish any *per se* rule concerning adequacy of provocation, they have noted that courts generally refuse to find adequate provocation when no physical violence or contact preceded the killing. *Pouncey, supra*, at 389. Adequacy is generally not established when the provocation was mere words such as threats or taunts. *Id.* Where provocation is established, the defendant must also show that he did not use more force than was necessary under the circumstances. *People v. Booker*, 208 Mich. App. 163; 529 N.W.2d 42 (1994).

During his closing argument, defense counsel asserted that petitioner was guilty only of voluntary manslaughter because at the time he shot deceased he was angry over being stood up by his girlfriend and finding her with another man, and because deceased made a statement which petitioner interpreted as a threat or challenge. Counsel did not also argue that, at most, petitioner was guilty of second degree murder because the prosecution had failed to prove beyond a reasonable doubt that petitioner had acted with a premeditated

and deliberate intent to kill. In passing, counsel simply asserted that petitioner did not premeditate and deliberate an intent to kill.

Defense counsel acted unreasonably by arguing that petitioner was guilty of voluntary manslaughter without also arguing that petitioner was, at most, guilty of second degree murder. Assuming, *arguendo*, that the jury would accept defense counsel's contention that petitioner was extremely angry and felt he was being threatened/challenged at the time of the shooting, it is extremely unlikely that a reasonable jury would have found that these factors constituted adequate provocation to reduce petitioner's criminal culpability for shooting and killing deceased to voluntary manslaughter. Because the voluntary manslaughter defense was so unlikely to succeed, defense counsel acted unreasonably by failing also to advance a position with a substantially greater likelihood of success, *i.e.*, that petitioner was, at most, guilty of second degree murder.

Defense counsel's best argument in support of his contention that adequate provocation reduced petitioner's culpability to manslaughter was that petitioner was extremely upset and angry when he shot at deceased because he found his girlfriend with another man. Merely seeing one's girlfriend with another man may be sufficient to provoke anger, but it has been held in Michigan not to be sufficient provocation to establish that an attack with deadly force is being made in the heat of passion. *People v. Jones*, 151 Mich. App. 1; 190 N.W.2d 189 (1986). The only other available justification for the use of deadly force was that petitioner felt threatened by the presence of the two men on the porch and construed deceased's statement "what's up?" as either a threat of or challenge to violence. Under the Michigan Supreme Court's reasoning in *Pouncey,* however,

mere words will rarely constitute adequate provocation for the use of deadly force. Even if the jurors accepted defense counsel's contention that petitioner acted out of anger and fear, they were unlikely to find that those two factors sufficed either to create adequate provocation for petitioner to shoot deceased or to establish that the amount of force used was reasonable.

Counsel's decision not to advance the fall-back position that, at most, petitioner was guilty of second degree murder cannot be excused as trial strategy. While counsel has great latitude in deciding what, if any, defense to present and what, if any, lesser offenses to request, that discretion is not unlimited. Counsel's strategic decisions must be reasonable but here, counsel's strategic decision was unreasonable because there was no realistic possibility that a jury would find sufficient provocation to reduce petitioner's criminal culpability to manslaughter, but there was an excellent chance that a jury would find that he was guilty of second degree murder because the elements of premeditation and deliberation had not been proven beyond a reasonable doubt. (*See* ARGUMENT 1, *supra*).

Petitioner was actually prejudiced by counsel's deficient performance because there is a reasonable probability that, had defense counsel made the available arguments as to why petitioner was, at most, guilty of second degree murder, the jury would have "had a reasonable doubt respecting the outcome" on the charge of first degree murder. As discussed in ARGUMENT I above, there is substantial question as to whether the jurors had enough evidence upon which they could infer that petitioner premeditated and deliberated an intent to kill, particularly in light of the five hours they spent in deliberation before agreeing upon a verdict which is indicative of doubt in the jurors' collective

minds. Thus counsel's failure to supply the jury with a credible basis upon which to find second degree murder "'undermine(s) confidence in the outcome'" of the trial and the jury's determination that petitioner was guilty of first degree murder. *Strickland Id.* at 684.

Under the above cited authorities, defense counsel acted unreasonably and ineffectively by arguing that petitioner was guilty only of voluntary manslaughter without also arguing that at most he was guilty of second degree murder. Accordingly, petitioner's conviction must be reduced from first degree murder to second degree murder and the case remanded for resentencing.

3. Petitioner's First Degree Murder Conviction Must Be Reduced To Second Degree Murder Because The Trial Judge Abused His Discretion By Admitting Into Evidence, Over Objection, Unfairly Prejudicial Photographs Of The Deceased's Body.

The admission into evidence of overly prejudicial photographs deprives a defendant of his right to a fair trial and violates his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. Photographic evidence relative to a material point may be admissible if its probative value is not outweighed by the potential for unfair prejudice. *People v. Falkner*, 389 Mich. 682; 209 N.W.2d 193 (1973); *People v. Barnard*, 93 Mich. App. 590, 286 N.W.2d 870 (1979); *People V. Terlisner*, 96 Mich. App. 423; 292 N.W.2d 223 (1980). Admission of photographs of a deceased victim lies within the discretion of the trial judge. *People v. Sullivan*, 97 Mich. App. 488, 296

N.W.2d 81 (1980). In a prosecution for murder, it is not error to receive in evidence photographs of the deceased body if the photographs are substantially necessary or instructive to show material facts of conditions. *Falkner, supra.*

Here the photographs had no probative value because they added nothing to the prosecutor's proofs. Petitioner admitted that he had shot and killed deceased. The medical examiner testified to observing two bullet wounds and described their locations. Petitioner did not challenge this testimony regarding either the number of wounds, their being gunshot wounds, or their locations. The photographs were not necessary to show the location of the wounds because this could have been done through the use of drawings or other means. Perhaps even more importantly the precise location of the wounds was not critical. It was the path the bullets traveled inside the body, not the precise location of the entrance (and exit) wound(s), that established the nature of the injuries the bullets produced. The photographs were not probative of the internal injuries produced by the bullets.

The trial judge clearly abused his discretion by admitting photographs of the deceased body which were highly prejudicial and had very little, if any, probative value. Because of the substantial prejudicial impact of the improper admission of the disturbing and highly inflammatory photographs, Mr. McKinney's conviction for first degree murder must be reduced to second degree murder.

4. Michigan's Mandatory Sentence Of Life Imprisonment Without Parole For First Degree Murder Is Unconstitutional As Applied To Petitioner Because, In Light Of His Age And Lack Of Criminal History, The Absence Of Judicial Discretion In Such Sentence Requirement Constitutes Cruel And Unusual Punishment.

This court previously acknowledged that, in certain situations, it is constitutionally necessary to treat juveniles and adults differently in sentencing and so found the death penalty to be cruel and unusual when applied to juveniles under sixteen years of age. *Thompson v. Oklahoma*, 487 U.S. 815; 108 S.Ct. 2687; 101 L.Ed.2d 702 (1988).

That principle applied to the death penalty in *Thompson* should be extended to non-discretionary sentences of life without parole for youthful offenders. The fact that first degree murder convictions, today, can be obtained by evidence of premeditation and deliberation occurring in a matter of seconds indicates the cruel and unusual nature of the Michigan statute. At common law, first degree murder signified a planned murder such as poisoning or lying in wait. *People v. Hoffmeister*, 394 Mich. 155; 229 N.W.2d 305 (1975). Premeditation has now been extended to situations, such as this one, where the defendant made a split second decision to fire his gun.

For the above reasons, the Michigan first degree murder statute should be found to constitute cruel and unusual punishment as it was applied to petitioner. The case should be remanded to the trial court for decision as to whether to

impose a parolable life sentence or any term of years as opposed to a mandatory sentence of life imprisonment without the possibility of parole.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed March 7, 2000]

No. 99-2275

FREDERICK ALLEN MCKINNEY, *Petitioner-Appellant,*	)
v.	)
KENNY ROBINSON, Warden, *Respondent-Appellee,*	)

ORDER

Before: MARTIN, Chief Judge.

Frederick Allen McKinney appeals a district court judgment that denied his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court denied McKinney a certificate of appealability, and McKinney now moves this court for a certificate of appealability pursuant to Fed. R. App. P. 22(b)(1).

Upon consideration, the application for a certificate of appealability is denied because McKinney cannot make a

substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c); *cf. Barefoot v. Estelle,* 463 U.S. 880, 893 (1983).

ENTERED BY ORDER OF THE COURT

/s/_____
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed December 3, 1999]

No. 99-CV-60030-AA

FREDERICK ALLEN MCKINNEY,
Petitioner,

v.

KENNY ROBINSON,
Respondent.

ORDER DENYING PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

Petitioner Frederick McKinney, a state prisoner, has appealed this Court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Before Petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). The Court must either issue a certificate, of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not

issue. 28 U.S.C. § 2253(c)(3); Fed. R, App. P. 22(b); *In re Certificates of Appealability,* 106 F.2d 1306, 1307 (6th Cir. 1997).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The substantial showing threshold is met if the petitioner demonstrates that the issues raised are debatable among reasonable jurists, that the court could resolve issues differently, or that the questions deserve to proceed further. *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983); *see also Lyons v. Ohio Adult Parole Authority,* 105 F.3d 1063, 1073 (6th Cir,), *cert. denied,* ___ U.S. ___, 117 S. Ct. 1724 (1997).

Petitioner raised the following habeas claims in his petition:

I. There was there was insufficient evidence of premeditation and deliberation to support his first-degree murder conviction.

II. Defense counsel was ineffective for unreasonably pursuing a strategy of persuading the jury that he was guilty only of voluntary manslaughter where reasonably competent counsel would have also argued that, at most, he was guilty of second-degree murder.

III. The trial judge abused his discretion in admitting into evidence, over defense objection; prejudicial photographs of the deceased's body.

IV. Michigan's mandatory sentence of life imprisonment without parole for first-degree murder is unconstitutional as applied because, in light of his age and lack of criminal history, the absence of judicial discretion in sentencing constitutes cruel and unusual punishment.

This Court denied Petitioner's first habeas claim because the Michigan Court of Appeals determination that there was sufficient evidence presented of premeditation and deliberation to support his first-degree murder conviction under the standard set forth in *Jackson v. Virginia,* 443 U.S. 307 (1979), was reasonable and supported by the record. Petitioner has thus failed to make a substantial showing that he was denied his constitutional rights in this regard.

This Court denied Petitioner's second habeas claim because the Michigan Court Appeals' decision that trial counsel was not ineffective under the standard set forth in *Strickland v. Washington,* 466 U.S. 668 (1984), was reasonable. Trial counsel's decision to rely upon the argument that Petitioner was only guilty of voluntary manslaughter was supported by the evidence and constitutes a matter of trial strategy, which will not be second-guessed upon habeas review. Petitioner has thus failed to make a

substantial showing that he was denied his constitutional right to the effective assistance of counsel.

This Court denied Petitioner's third habeas claim because the trial court's decision to admit the photograph of the deceased concerns a perceived error of state law, which does not warrant federal habeas relief. *See, e.g., Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). Further, the trial court's decision did not deny Petitioner a fundamentally fair trial. Petitioner has thus not made a substantial showing of a constitutional violation concerning this claim.

This Court denied Petitioner's fourth habeas claim because Petitioner was sentenced to the mandatory term of life imprisonment without parole on his first-degree murder conviction, *see* Mich. Comp. Laws § 750,316, and there was no extreme disparity between Petitioner's crime and his sentence so as to offend the Eighth Amendment. Petitioner has thus not made a substantial showing of a constitutional violation concerning this sentencing claim.

Accordingly, the Court **DENIES** Petitioner's request for a certificate of appealability.

IT IS SO ORDERED.

/s/_____
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

DATED: DEC 2 1999

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed October 14, 1999]

No. 99-CV-60030-AA

FREDERICK ALLEN MCKINNEY,
Petitioner,

v.

KENNY ROBINSON,
Respondent.

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Frederick McKinney, a state prisoner currently confined at the Mound Correctional Facility in Detroit, Michigan, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C § 2254. He was convicted of first-degree murder, felony firearm, and carrying a concealed weapon following a jury trial in the Saginaw County Circuit Court in 1994. He was sentenced to life imprisonment without parole on the murder conviction, a consecutive two-year term of imprisonment on the felony firearm conviction,

and a concurrent two-year term of imprisonment on the concealed weapon conviction.

In his petition, Petitioner challenges his state court proceedings, raising claims regarding the sufficiency of evidence, the effectiveness of trial counsel, the admission of prejudicial photographs, and the constitutionality of his sentence. For the reasons stated below, Petitioner's request for habeas relief is denied and the petition for a writ of habeas corpus is dismissed.

I. Factual Background

Petitioner's convictions stem from the shooting death of Bruce Longuemire outside the home of Yvette Haynes in Saginaw, Michigan on the evening of November 26, 1993. The testimony presented at trial established that Petitioner, who was then 17 years old, had been dating Arnetra Stacey for over one year. Petitioner was supposed to meet Arnetra at her home at 9:00 p.m. on the night of the shooting. After working that evening, Petitioner went home, cleaned up, and drove to Arnetra's house around 8:30 p.m. Arnetra was not home. Petitioner then drove to several locations in the area and eventually found her car outside Yvette Haynes' home around 9:20 p.m.

Petitioner parked his car, armed himself with a weapon that he kept in the glove compartment of his car, and approached the house. Petitioner knocked on the door, and when no one answered, began pounding loudly on the door. Petitioner then went to the side of the house, looked in a window, and knocked on that window. Petitioner stepped inside the screened porch, looked in the front door window,

and saw Yvette and a man named Stewart Sumpter inside the house. He did not see Arnetra who was in a bedroom with, Bruce Longuemire at the time.

When Yvette came to the door, Petitioner asked her to let him in. Yvette testified that she did not let Petitioner in because she was afraid he would get into a fight with Longuemire inside the house. Yvette also testified that, on the night before the shooting, she overheard Petitioner tell Arnetra that he would kill any man who he found talking to her.

Arnetra eventually exited the house through the back door and met Petitioner near the side of the house. She told him that neither of the "dudes" inside the house were for her. Petitioner asked what she meant by "dudes" and became very angry upon realizing that another man was inside the house. Arnetra tried to calm Petitioner down as the two walked toward the front of the house.

Longuemire and Steward were on the front porch when Petitioner and Arnetra reached the front of the house. Petitioner asked which of them had been talking to his girlfriend. Longuemire raised his hands and responded, "What's up?" Petitioner and Arnetra testified that when spoken between strangers in their neighborhood, the phrase "what's up" is a challenge to fight. Stewart, however, testified that Longuemire ended the phrase with "man" which signifies respect between strangers such that the phrase was merely a question and not a challenge. Petitioner admitted that Longuemire's tone was not angry or threatening, but stated that he interpreted the phrase as a challenge under the circumstances.

Within seconds, Petitioner pulled a gun from his coat, aimed and fired at Longuemire. As Longuemire stumbled, Petitioner stepped toward Longuemire and fired another shot at him. At trial, Petitioner admitted shooting Longuemire, but stated that he was very angry about the situation with his girlfriend and the confrontation, and was not thinking straight at the time. Petitioner claimed that he did not intend to kill Longuemire, but just wanted to "scare him and hurt him."

The investigating police detective testified that one of the bullets recovered from the scene had entered the floor immediately inside the front door at a downward angle. It was his opinion that the bullet was fired from the front door of the house or inside the house. The medical examiner testified that two bullets had entered Longuemire's body, one in the lower back and one in the neck, but that death was caused by the former. He further testified that the path of the back wound was consistent with the gunshot being fired while Longuemire lay on the ground or while he stood at the top of stairs and the shooter stood at the bottom.

Several photographs of Longuemire's body were also admitted into evidence over defense objection. The prosecution acknowledged that the photographs were disturbing, but asserted that they helped to establish Petitioner's intent to kill the deceased. The trial court found that the photographs were not overly shocking and concluded that their probative value outweighed the prejudice to Petitioner.

At the close of trial, the prosecution argued that Petitioner had acted with premeditation and deliberation in shooting Bruce Longuemire and was guilty of first-degree

premeditated murder. Defense counsel argued that Petitioner had acted in the heat of passion, not with premeditation and deliberation, and was only guilty of voluntary manslaughter. After deliberations, the jury found Petitioner guilty of first-degree murder, felony firearm, and carrying a concealed weapon. The trial court subsequently sentenced Petitioner to life imprisonment without parole on the murder conviction and consecutive and concurrent terms of two years imprisonment on the weapons convictions.

II. Procedural History

Following his convictions and sentencing, Petitioner filed an appeal as of right with the Michigan Court of Appeals, raising the following issues:

I. There was there was insufficient evidence of premeditation and deliberation to support his first-degree murder conviction.

II. Defense counsel was ineffective for unreasonably pursuing a strategy of persuading the jury that he was guilty only of voluntary manslaughter where reasonably competent counsel would have also argued that, at most, he was guilty of second-degree murder.

III. The trial judge abused his discretion in admitting into evidence, over defense objection, prejudicial photographs of the deceased's body.

IV. Michigan's mandatory sentence of life imprisonment without parole for first-degree murder is unconstitutional as applied because, in light of his age and lack of criminal history, the absence of judicial discretion in sentencing constitutes cruel and unusual punishment.

The Court of Appeals affirmed Petitioner's convictions and sentences in a per curium unpublished opinion. *People v. McKinney,* No. 177618 (Mich. Ct. App. May 2, 1997). Petitioner filed an application for leave to appeal with the Michigan Supreme Court raising the same issues, which was denied in a standard order. *People v. McKinney,* No. 109501 (Mich. Jan. 30, 1998).

Petitioner, through counsel, filed the present habeas petition on January 20, 1999, raising, the same claims that were presented to the Michigan state courts on direct appeal. Respondent filed an answer to the petition on August 19, 1999, asserting that it should be denied for lack of merit. Respondent submitted the necessary state court records and transcripts on September 21, 1999.

III. Standard of Review

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), govern this case because Petitioner filed his habeas petition after the AEDPA's effective date. *See Lindh v. Murphy,* 521 U.S. 320, 336 (1997). The AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C, §2254(d) (1996).

The United States Court of Appeals for the Sixth Circuit recently discussed the deference to be accorded a state court's decision on habeas review in considering whether that decision "involved an unreasonable application of" clearly eslablished federal law:

> The deference to the state courts' judgments required by the AEDPA is achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be debatable among reasonable jurists if it is so offensive to existing precedent, so devoid of record

> support, or so arbitrary as to indicate that it is outside the universe of plausible, credible outcomes.

Nevers v. Killinger, 169 F.3d 352, 362 (6th Cir. 1999), *cert. denied*__ U.S. __, 119 S. Ct. 2340 (1999) (internal citations omitted); *see also Tucker v. Prelesnik,* 181 F.3d 747, 753 (6th Cir. 1999) (discussing *Nevers* and concluding that "the writ will issue if the unreasonableness of the state court's application of clearly established precedent is not debatable among reasonable jurists. The unreasonableness of the application will not be debatable if it is so offensive to the precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.").

Additionally, §2254(e)(I) requires that this Court presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption only with clear and convincing evidence. *Warren v. Smith,* 161 F.3d 358, 360-61 (6th Cir. 1998), *cert. denied* __ U.S. __, 119 S. Ct. 2430 (1999).

IV. Analysis

A. Insufficient Evidence

Petitioner first claims that he is entitled to habeas relief because there was insufficient evidence presented at trial to convict him of first-degree murder. Specifically, Petitioner claims that the prosecution failed to establish that he acted with premeditation and deliberation.

In *Jackson v. Virginia,* 443 U.S. 307 (1979), the Supreme Court established that a federal court's review of a sufficiency of the evidence claim must focus on whether "after viewing the evidence in the light most favorable to the prosecution, *any* ralional trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319; *see also DeLisle v. Rivers,* 161 F.3d 370, 389 (6th Cir. 1998). Because a claim of insufficiency of the evidence presents a mixed question of law and fact, *Whaley v. Thompson,* 22 F.Supp.2d 1146, 1166 (D. Ore. 1998), this Court must determine whether the state court's application of the *Jackson* standard was reasonable. *Nevers,* 169 F.3d at 360.

Under Michigan law, first-degree premeditated murder requires proof that the Defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v. Schollaert,* 194 Mich. App. 158, 170, 486 N.W.2d 312 (1992). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *ld.* Premeditation and deliberation may be established by evidence of "(l) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id.* Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v. Jolly,* 442 Mich. 458, 466, 502 N.W.2d 177 (1993).

In concluding that sufficient evidence was presented to support Petitioner's convictions, the Michigan Court of Appeals stated:

> Premeditation and deliberation "characterize a thought process undisturbed by hot blood," and "require sufficient time to allow the defendant to take a second look." In determining whether the evidence on this element was sufficient, we must view the evidence in the light most favorable to the prosecution and determine whether this element was proven beyond a reasonable doubt. There was evidence indicating that defendant told his girlfriend that he would kill anyone whom he found talking to her, that, while armed, defendant went searching for her when she was not at home and that he was armed when he approached the house where she was visiting. There was also evidence indicating that, although angry, he talked to his girlfriend before he approached the decedent on the front porch of the house in a confrontational manner. Based on this evidence, a reasonable jury could conclude that defendant thought about his actions "undisturbed by hot blood" and that he had sufficient time to take a second look.

People v. McKinney, No. 177618, * I (Mich. Ct. App. May 2, 1997) (internal citations omitted).

Having carefully reviewed the record, this Court cannot conclude that the Michigan Court of Appeals' determination that the facts established first-degree murder is "not debatable among reasonable jurists" because "it is so offensive to existing precedent, so devoid of record support,

or so arbitrary as to indicate that it is outside the universe of plausible, credible outcomes."

The testimony presented at trial revealed that, prior to the shooting, Petitioner had told his girlfriend, Arnetra Stacey, that he would kill anyone he saw talking to her. On the night of the shooting, Petitioner searched for Arnetra and found her with other men at a Yvette Hayne's house. Petitioner approached the house carrying a weapon, and, after speaking to Arnetra, confronted the men on the porch. In response to Bruce Longuemire raising his hands and saying, "What's up?", Petitioner pulled out his gun and fired at Longuemire. Petitioner proceeded up the porch steps and fired another shot when Longuemire stumbled. After the shooting, Petitioner fled the scene and gave the gun to a friend for disposal, but then retrieved the gun and hid it in some bushes before eventually turning himself in. Given this evidence, a rational trier of fact could find that the prosecution established beyond a reasonable doubt that Petitioner acted with premeditation and deliberation in the shooting death of Bruce Longuemire.

Petitioner's insufficient evidence claim essentially challenges the inferences that the jury drew from the testimony presented at trial and challenges the weight to be accorded certain pieces of evidence. However, it is well-settled that "[a] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Walker v. Engle,* 703 F.2d 959, 969-70 (6th Cir. 1983). Given the evidence presented at trial, including Petitioner's

own testimony, this Court finds that a rational trier of fact could have found the elemeats of first-degree premeditated murder beyond a reasonable doubt. Petitioner is therefore not entitled to relief on this claim.

B. Ineffective Assistance of Trial Counsel

Petitioner next claims that trial counsel was ineffective for failing to present the jury with a theory that, at most, he was only guilty of second-degree murder because the prosecution failed to establish that he acted with premeditation.

In *Strickland v. Washington,* 466 U.S. 668 (1984), the United States Supreme Court set forth a two-pronged test for determining whether a habeas petitioner has received the ineffective assistance of counsel. First, a petitioner must prove that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed by the Sixth Amendment. 466 U.S. at 687. Second, the petitioner must establish that the deficient performance prejudiced the defense. Counsel's errors must have been so serious that they deprived the petitioner of a fair trial or appeal.

As to the performance prong, a petitioner must identify acts that were "outside the wide range of professionally competent assistance" in order to prove deficient performance. *Id.* at 690. The reviewing court's scrutiny of counsel's performance is highly deferential. *Id.* at 689. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. Trial counsel's

tactical decisions are particularly difficult to attack, and a petitioner bears the burden of overcoming a presumption that the challenged action might be considered sound trial strategy. *Tucker*, 181 F.3d at 754 (citing *Strickland,* 466 U.S. at 689).

To satisfy the prejudice prong under *Strickland,* a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Id.* In *Lockhart v. Fretwell,* 506 U.S. 364, 369-70 (1993), the Supreme Court observed that "an analysis focusing solely on outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable is defective." The Sixth Circuit has thus concluded that a reviewing court should focus on whether counsel's alleged errors "have undermined the reliability of and confidence in the result." *McQueen v. Scroggy,* 99 F.3d 1302, 1311 (6th Cir. 1996), *cert. denied* __U.S.__, 117 S. Ct. 2536 (1997). "On balance, the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 1311-12 (quoting *Strickland,* 466 U.S. at 686).

In this case, the Michigan Court of Appeals concluded that trial counsel's decision to emphasize voluntary manslaughter, rather than second-degree murder, was a trial strategy which should not be second-guessed. *People v. McKinney.* No. 177618, *2 (Mich. Ct. App. May 2, ,1997). A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Strickland,* 466 U.S. at 698.

Consequently, this Court must determine whether the state court's application of the *Strickland* standard was reasonable, *Tucker,* 181 F.3d at 752-53; *Nevers,* 169 F.3d at 360.

Having reviewed the record, this Court concludes that the Court of Appeals' decision was reasonable and not "so offensive to existing precedent, so devoid of record support, or so arbitrary as to indicate that it is outside the universe of plausible, credible outcomes." Petitioner has not established that trial counsel's performance was deficient under *Strickland.* As a primary defense to the charged offenses, trial counsel argued that Petitioner acted in the heat of passion and was only guilty of voluntary manslaughter, the verdict other than acquittal that would be most favorable to Petitioner. This argument was reasonably supported by the evidence that Petitioner was the jealous type, that he was stood up by his girlfriend and found her at a house with other men, that he was denied entry into the home for a period of time, that he believed the deceased challenged him, that he became very angry, and that he fired shots within a few seconds. Further, the argument voluntary manslaughter did not preclude the jury from finding Petitioner guilty of second-degree murder. In fact, trial counsel argued that the prosecution failed to establish that Petitioner acted with premeditation and challenged the state's evidence that Petitioner had time to take a "second look" during the course of events surrounding to the shooting. Additionally, the trial court instructed the jury on the elements of second-degree murder as required by Michigan law.

Trial counsel's decision to rely upon the argument that Petitioner was only guilty of voluntary manslaughter was a matter of trial strategy, which will not be second-guessed

upon habeas review. *See, e.g., Shaba v. United States,* 721 F. Supp. 132, 139 (1989), *aff'd.* 896 F.2d 554 (6th Cir. 1990) (decision to pursue mistaken identity defense, rather than attack government's failure to exercise control over informant, was matter of trial strategy and could not support ineffective assistance claim); *Johnson v. Morris,* 848 F.2d 191, 1988 WL 50639, * 1 (6th Cir. 1988) (counsel was not ineffective for failing to argue that petitioner was guilty of aggravated assault given primary defense that gun accidentally discharged during struggle because such an argument would have compromised strategy for absolution of all guilt). Petitioner's disagreement with counsel's trial strategy does not support an ineffective assistance of counsel claim. *Strickland,* 466 U.S. at 689. Petitioner has not shown that counsel was ineffective for primarily arguing that Petitioner was guilty of voluntary manslaughter in defense to the first-degree murder charge. Petitioner is thus not entitled to habeas relief on this claim.

C. Admission of Photographs of Deceased

Petitioner also claims that the trial court abused its discretion in admitting into evidence photographs of Bruce Longuemire's body. It is well-established that alleged trial court errors in the application of state procedure or evidentiary law, particularly, regarding the admissibility of evidence, are generally not cognizable as grounds for federal habeas relief. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991); *Pulley v. Harris,* 465 U.S. 37, 41 (1984); *Serra v. Michigan Dep't of Corrections,* 4 F.3d 1348, 1354 (6th Cir. 1993); *see also Olsen v. McPaul,* 843 F.2d 918, 933 (6th Cir. 1988) (such claims are almost always rejected as grounds for granting a writ of habeas corpus). Instead, questions

concerning the admissibility of evidence, as well as its probative or prejudicial value, are properly left to the sound discretion of the trial court. *Oliphant v. Koehler,* 594 F.2d 547, 555 (6th Cir. 1979). Only where the admission of the disputed evidence rendered the trial "so fundamentally unfair as to constitute a denial of federal rights" may it provide grounds for granting a writ of habeas corpus. *Clemmons v. Sowders,* 34 F.3d 352, 356 (6th Cir. 1994).

Petitioner alleges that admission of the photographs of Bruce Longuemire's body was highly prejudicial and violated his constitutional right to a fair trial. The Michigan Court of Appeals considered this issue as a matter of state evidentiary law and concluded that no error occurred. The Court of Appeals found that the photographs "were instructive to show the location of the deceased's wounds, a material condition of the body relevant to the issue of defendant's intent to kill." *People v. McKinney,* No. 177618, *2 (Mich. Ct. App. May 2, 1997).

This Court agrees with the Michigan Court of Appeals that the trial court did not err in admitting the photographs of the deceased, as they were relevant to a determination of Petitioner's intent. Further, admission of the photographs did not so infect the entire trial or prejudice Petitioner so as to constitute a violation of due process. Petitioner is not entitled to habeas relief of this claim.

D. Sentencing Claim

Lastly, Petitioner claims that his mandatory sentence of life imprisonment without parole for first-degree murder constitutes cruel and unusual punishment due to his age and

lack of criminal history. Relying upon state law precedent, the Michigan Court of Appeals concluded that Petitioner's sentence did not constitute cruel and unusual punishment. *People v. McKinney,* No. 177618, *2 (Mich. Ct. App. May 2, 1997). To the extent that Petitioner relies upon state law to challenge his sentence, he fails to state a claim for federal habeas relief. *Atkins v. Overton,* 843 F. Supp. 258, 260 (E.D. Mich. 1994). A petitioner has no state-created interest in having the Michigan Sentencing Guidelines applied rigidly in determining his sentence. *Thomas v. Foltz,* 654 F. Supp. 105, 106-07 (E.D. Mich. 1987). Further, there is no federal constitutional right to individualized sentencing. *United States v. Thomas,* 49 F.3d 253, 261 (6th Cir. 1995). Accordingly, to the extent that Petitioner is asserting a state law proportionality claim, he is not entitled to federal habeas relief.

Petitioner is also not entitled to habeas relief on the claim that his life sentence without parole constitutes cruel and unusual punishment under the Eighth Amendment. In *Harmelin v. Michigan,* 501 U.S. 957, 965 (1991), the United States Supreme Court ruled that a mandatory life sentence without possibility of parole for a first offense of possession with intent to distribute more than 650 grams of cocaine was not cruel and unusual punishment prohibited by the Eighth Amendment. Following *Harmelin,* the United States Court of Appeals for the Sixth Circuit ruled that "there is no requirement of strict proportionality; the Eighth Amendment is offended only by an extreme disparity between crime and sentence." *United Slates v. Hopper,* 941 F.2d 419, 422 (6th Cir. 1991). Federal courts will engage in a proportionality analysis only in cases where the penalty imposed is death or life in prison without possibility of parole. *See United States*

v. Thomas, 49 F.3d 253, 261 (6th Cir. 1995) (refusing to disturb HIV-positive defendant's sentence of 110 months imprisonment with four years of supervised release for one count of distributing crack cocaine and one count of possession with intent to deliver the same).

In this case, Petitioner was sentenced to the mandatory term of life imprisonment without parole on his first-degree murder conviction. Mich. Comp. Laws § 750.316. This Court concludes that there is no extreme disparity between Petitioner's crime and his sentence so as to offend the Eighth Amendment. The testimony presented at trial revealed that Petitioner had previously warned his girlfriend that he would kill any man be saw talking to her, that Petitioner searched for his girlfriend on the night of the shooting and found her at a house with the deceased, that Petitioner armed himself before approaching the house, and that Petitioner confronted the deceased outside the home. In response to Bruce Longuemire saying, "What's up?", Petitioner pulled out his gun, shot Longuemire once, and proceeded up the porch steps to fire another shot after Longuemire stumbled. Such facts demonstrate that the sentence imposed, while severe, reflects the nature and severity of Petitioner's crime and does not constitute cruel and unusual punishment. Petitioner is not entitled to habeas relief on his sentencing claim.

V. Conclusion

For the reasons stated, this Court concludes that Petitioner is not entitled to federal habeas relief on the claims presented. Accordingly,

IT IS ORDERED that Petitioner's request for habeas relief is **DENIED** and the petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE.**

/s/_____
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

DATED: October 14 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed October 14, 1999]

Case No. 99 CV-60030-AA

FREDERICK ALLEN MCKINNEY,
Petitioner,

v.

KENNY ROBINSON,
Respondent.

JUDGMENT

The above-entitled matter having come before the Court on a Petition for a Writ of Habeas Corpus, Honorable George Caram Steeh, United States District Judge, presiding, and in accordance with the Opinion and Order entered on October 14, 1999;

IT IS ORDERED AND ADJUDGED that the Petition for a Writ of Habeas Corpus is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/_____
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

DATED: October 14, 1999